

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information)	
and Other Customer Information)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)	
Communications Act of 1934, As Amended)	
To: The Commission		

COMMENTS

Cingular Wireless LLC (“Cingular”), by its attorneys, hereby submits these comments in response to the *Clarification Order and Second Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the captioned docket.¹ The *FNPRM* attempts to clarify the status of the Customer Proprietary Network Information (“CPNI”) rules² after the decision in *U S West v. FCC*³ and seeks comment on the Commission’s interpretation of this decision.

The Commission is seeking “to obtain a more complete record on ways in which customers can consent to a carrier’s use of their CPNI” and the impact of these mechanisms on

¹ *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115 and 96-149, *Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247 (rel. September 7, 2001).

² 47 C.F.R. §§ 64.2001-64.2009.

³ *U S West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (June 5, 2000) (No. 99-1427) (“*U S West*”).

the government interests in privacy and fostering competition.⁴ Any such efforts by the Commission should be guided by the following principles: (i) carriers should have the flexibility to choose the method for obtaining customer consent, whenever consent is required, for the use or disclosure of CPNI; (ii) the previously adopted “total service” approach allowing the use or disclosure of CPNI without customer permission in certain circumstances should be retained; and (iii) the consent requirements regarding the use or disclosure of location identifying CPNI should be addressed in a separate proceeding.⁵

DISCUSSION

I. Carriers Should Have Flexibility to Choose the Method for Obtaining Customer Consent for the Use or Disclosure of CPNI

In implementing the customer approval requirements of Section 222(c)(1) of the Communications Act, the Commission should afford carriers the flexibility to determine whether an opt-in or opt-out consent mechanism best suits the customer-carrier relationship based on the type of CPNI used or disclosed. The Commission need not mandate a particular opt-in or opt-out approach in order to protect consumer privacy and promote competition. Market forces will

⁴ *FNPRM* at ¶ 12. The Commission previously concluded that the court’s decision had vacated in its entirety the Order in *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061 (1998) (“*CPNI Order*”). *See MCI Telecommunications Corp. v. Pacific Bell*, 14 FCC Rcd 15362, ¶ 13 (1999). To the extent the Commission now has a different interpretation, it should not be applied retroactively. Although the Commission may change its rules or policies with adequate explanation, *see Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (1970), it may not apply those rules or policies retroactively. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988).

⁵ As discussed below, should location information be addressed along with other forms of CPNI as part of this proceeding, the Commission must incorporate the record developed in response to the Cellular Telecommunications and Internet Association (“CTIA”) Petition for Rulemaking on this issue. *See Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. Mar. 16, 2001).

ensure that carriers use the most effective method for obtaining customer consent. Carriers, who will no doubt seek the most cost-effective and least disruptive mechanisms, will also need to recognize and accommodate the growing demands of their customers for privacy or see those customers seek services from other providers.⁶ Mandatory regulatory requirements simply are not necessary to protect consumers or to promote competition.

The Commission previously concluded that an opt-in mechanism best ensures that customers confer knowing approval for the sharing of their information with affiliates of the carrier, and that CPNI could be shared with other affiliates that have a relationship with the customer because such sharing would not implicate privacy concerns.⁷ The Commission rejected opt-out mechanisms because customers might not read a carrier's disclosures, comprehend their rights or understand how to protect those rights.⁸ The Commission further concluded that an opt-in approach would limit the potential advantage that incumbent carriers could have over new entrants.⁹

As the Tenth Circuit found, this approach is too restrictive.¹⁰ A more flexible approach is needed. Cingular urges the Commission to adopt the "interim" approach being followed during the pendency of this proceeding on a permanent basis. Under this approach, carriers may obtain consent consistent with the notification requirements in Section 64.2007(f), using either an opt-

⁶ In the financial services sector, for example, recent television ads for the Capital One "No Hassle" credit card emphasize that users of the card will not be contacted by telemarketers, indicating that the issuer does not use or sell to third parties private customer information for telemarketing purposes.

⁷ *FNPRM* at ¶ 14.

⁸ *See id.* at ¶ 15; *CPNI Order* at ¶ 87.

⁹ *Id.*

¹⁰ *See U S West*, 182 F.3d at 1240.

out or opt-in mechanism at the discretion of the carrier.¹¹ This approach is appropriate because it allows market forces to balance the competitive and privacy concerns expressed by the Commission. It also affords customers an informed choice deemed acceptable under other regulatory schemes.¹²

The opt-out approach has been adopted in other areas to regulate information flow considered private and confidential. For example, the healthcare system is premised on the willingness of individuals to share the most intimate details of their lives with their healthcare providers. According to the Department of Health and Human Services, “[a]mong different sorts of personal information, health information is among the most sensitive.”¹³ Yet, in some cases medical records are subject to opt-out mechanisms. The Final Rule promulgated by the Department of Health and Human Services creating “Standards for Privacy of Individually Identifiable Health Information” has a specific exemption for covered health care providers.¹⁴

¹¹ *Id.* at ¶ 8.

¹² See discussion *infra* regarding the opt-out methods used in connection with financial services and healthcare.

¹³ 65 Fed. Reg. 82464 (2000).

¹⁴ See 45 C.F.R. §164.510 [Uses and disclosures requiring an opportunity for the individual to agree or to object.]

A covered entity may use or disclose protected health information without the written consent or authorization of the individual as described by Secs. 164.506 [Consent for uses or disclosures to carry out treatment, payment, or health care operations] and 164.508 [Uses and disclosures for which an authorization is required], respectively, provided that the individual is informed in advance of the use or disclosure and has the opportunity to agree to or prohibit or restrict the disclosure in accordance with the applicable requirements of this section. The covered entity may orally inform the individual of and obtain the individual's oral agreement or objection to a use or disclosure permitted by this section.

(a) Standard: use and disclosure for facility directories.

(1) Permitted uses and disclosure. Except when an objection is expressed in accordance with paragraphs (a)(2) or (3) of this section, a covered health care provider may:

(i) Use the following protected health information to maintain a directory of individuals in its facility:

(A) The individual's name;

(continued on next page)

Privacy concerns that patients have with regard to their health information are stronger than CPNI privacy concerns. CPNI should not be afforded more protection than medical information.

Similarly, financial information is considered extremely sensitive, but is subject to less restrictive regulations than those previously imposed by the FCC on CPNI. Under rules promulgated jointly by the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of Thrift Supervision (“OTS”) (the “Joint Privacy Rule”),¹⁵ a financial institution may disclose nonpublic personal information to a nonaffiliated third party if (a) such financial institution discloses to the consumer that such information may be disclosed to such third party; (b) the consumer is given the opportunity, before disclosure, to direct that the information not be disclosed; (c) the consumer is given an explanation of how the consumer can

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- (B) The individual's location in the covered health care provider's facility;
 - (C) The individual's condition described in general terms that does not communicate specific medical information about the individual; and
 - (D) The individual's religious affiliation; and
 - (ii) Disclose for directory purposes such information:
 - (A) To members of the clergy; or
 - (B) Except for religious affiliation, to other persons who ask for the individual by name.

(2) Opportunity to object. A covered health care provider must inform an individual of the protected health information that it may include in a directory and the persons to whom it may disclose such information (including disclosures to clergy of information regarding religious affiliation) and provide the individual with the opportunity to restrict or prohibit some or all of the uses or disclosures permitted by paragraph (a)(1) of this section.

(3) Emergency circumstances. [Text addressing patient incapacity and emergency treatment omitted.]

¹⁵ The financial services model is an implementation of the Gramm-Leach-Bliley Act. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (“GLBA”). Section 504 of the GLBA provides that the OCC, FRB, FDIC, OTS and other departments and agencies, after consultation with representatives of state insurance authorities designated by the National Association of Insurance Commissioners, are to prescribe regulations to carry out the relevant privacy provisions of the GLBA. The FRB, OCC, FDIC and OTS decided to act jointly in proposing rules to implement the GLBA privacy provisions with respect to entities under their jurisdiction (Privacy of Consumer Financial Information, 65 Fed. Reg. 8770 (June 1, 2000)),
(continued on next page)

exercise that nondisclosure option; and (d) the customer does not forbid the disclosure of the information.¹⁶ The Joint Privacy Rule stipulates that these criteria are satisfied by an opt-out mechanism. Moreover, an institution will be deemed to have given a customer a reasonable opportunity to opt-out if it mails the customer the required notices and allows the customer to opt-out by mailing a form, calling a toll-free number, or “any other reasonable means” within 30 days from the date of the notice.¹⁷ These principles effectively balance the privacy interests of consumers with the marketing interests of carriers and illustrate that opt-out mechanisms are an appropriate method for obtaining consumer consent. It would be unwarranted for the Commission to afford greater protection for CPNI than Congress and the relevant banking regulatory agencies have afforded for financial information.

proposed February 22, 2000). On June 1, 2000, the Agencies published the final version of the Privacy Rule (Privacy of Consumer Financial Information, 65 Fed. Reg. 35162 (June 1, 2000)).

¹⁶ Section 6802 reads in relevant part:

(b) Opt out

(1) In general

A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless -

- (A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;
- (B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and
- (C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option.

15 U.S.C.A. §6802(b)(1) (West Supp. 2001).

¹⁷ 65 Fed. Reg. 35203 (June 1, 2000).

Cingular urges the Commission to allow carriers the flexibility to choose either an opt-out or opt-in mechanism to obtain customer permission to use or disclose CPNI whenever approval is required.

II. The “Total Service” Approach For the Use or Disclosure of CPNI Should be Retained

In the *CPNI Order*, the Commission stated that Section 222(c)(1) of the Act allows a carrier to use, without the customer’s prior approval, the customer’s CPNI derived from the complete service to which the customer subscribes from that carrier and its affiliates, for marketing purposes within the existing service relationship.¹⁸ The Commission concluded that carriers must notify customers of their rights under Section 222 and then obtain express written, oral or electronic customer approval – a “notice and opt-in” approach – only if a carrier wishes to use CPNI to market services outside the customer’s existing service relationship with the carrier. The Commission deemed this consent mechanism the “total service” approach and defined the circumstances under which customer approval was required.

Under the total services approach, carriers can use CPNI to market services within the same category whenever a customer is already subscribed to service within that category.¹⁹ Wireless carriers can also use CPNI to market Customer Premises Equipment and information services or to provide installation, maintenance and repair services without obtaining customer consent.²⁰ Similarly, customer permission is not required for provision of the telecommunications service from which the CPNI is derived,²¹ or services necessary to, or used

¹⁸ *CPNI Order* at ¶ 4.

¹⁹ 47 C.F.R. § 64.2005(a).

²⁰ *Id.* at §§ 64.2005(b)(1), (c)(1).

²¹ 47 U.S.C.A. § 222(c)(1)(A) (West Supp. 2001).

in, the provision of such telecommunications service including the publishing of directories.²² Cingular urges the Commission to retain this total services approach.²³

III. The Use or Disclosure of Location Identifying CPNI Should be Addressed in a Separate Proceeding

By its nature, location-identifying information affects only one segment of the telecommunications industry – the wireless industry. In 1999, however, Congress added “location” to the definition of CPNI and amended Section 222(f) to read, “without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to [certain types of location information except in specified emergency circumstances.]”²⁴ In recognition of the sensitive nature of location-identifying information, the Section 222(f) standard for approval of the use of location information is different than that applied to other CPNI. Because of the unique nature of location information, the Commission should consider requirements for obtaining consent to use location-identifying CPNI in a separate proceeding.

The Commission previously sought comments on the need for such a separate proceeding to address this issue at the behest of the CTIA.²⁵ Cingular supported CTIA’s proposal to make specific location privacy principles applicable to wireless carriers, noting that location-based services are unique to wireless applications.²⁶ Cingular continues to agree with CTIA that

²² *Id.* at § 222(c)(1)(B).

²³ *See* 47 C.F.R. § 64.2005.

²⁴ *FNPRM* at ¶ 22.

²⁵ *Wireless Telecommunications Bureau Seeks Comment on Request to Commence Rulemaking to Establish Fair Location Information Practices*, WT Docket No. 01-72, Public Notice, DA 01-696 (rel. Mar. 16, 2001).

²⁶ Comments of Cingular Wireless LLC, WT Docket No. 01-72, at 1 (Apr. 6, 2001) (“Cingular CTIA Comments”); Reply Comments of Cingular Wireless LLC, WT Docket No. 01-72 (Apr. 24, 2001).

location-identifying CPNI should be treated differently than other forms of CPNI. Thus, privacy guidelines should be based upon the four factors set forth in CTIA's proposal: (1) notice; (2) consent; (3) security/integrity; and (4) technological neutrality.²⁷ These four factors comprise the basis of generally accepted information practices.²⁸

In the separate proceeding, the Commission should address the use of CPNI by non-licensees. Section 222(f), for example, does not apply expressly to non-licensees.²⁹ As such, it is unclear whether non-licensee entities such as third-party service providers can be held accountable under the Communications Act for abuses of customer location-identifying information. In order to close this loophole and adequately protect consumers, the Commission should make clear that non-licensee entities are subject to its CPNI rules. Congress gave the Commission the authority for such an approach when it amended the Communications Act to extend the Commission's forfeiture authority to all persons, rather than licensees, who violate its rules.³⁰ Thus, the Commission has held non-licensee antenna tower owners liable for violations of the Commission's rules and has issued forfeitures against those tower owners.³¹ Moreover,

²⁷ See Cingular CTIA Comments at 2.

²⁸ As noted in Cingular's Comments on the CTIA petition, the Commission should propose a safe-harbor for wireless service providers that comply with any guidelines ultimately adopted as a result of the proceeding instituted in response to CTIA's Petition. Cingular CTIA Comments at 2, 5.

²⁹ See 47 U.S.C.A. § 222(c)(1) (West Supp. 2001).

³⁰ See Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat 33 (1978).

³¹ See 47 C.F.R. §§ 17.1-17.58 ("Construction, Marking and Lighting of Antenna Structures"); *Centel Cellular Company of North Carolina Limited Partnership Notice of Apparent Liability for Forfeiture for Station KNKA291 in the Domestic Public Cellular Radio Telecommunications Service Serving Market 47B at Greensboro, North Carolina*, 11 FCC Rcd 10800, ¶ 23 (1996).

Section 312 authorizes the Commission to issue cease and desist orders against any person in violation of the Communications Act or the Commission's rules.³²

Finally, because location-identifying information can be obtained and used by non-telecommunications carriers such as third-party service providers in what promises to be a highly competitive market, any rules adopted by the Commission should not disadvantage wireless carriers. Thus, to the extent the CPNI rules are not extended to all entities using CPNI, wireless carriers should be given the flexibility to respond to actions taken by non-licensees. Rigid rules would simply stifle the development of services which are just now beginning to be offered and could place an unfair market disadvantage on wireless carriers in the location services market.

CONCLUSION

For the foregoing reasons, Cingular urges the Commission (i) to allow carriers the flexibility to choose the method for obtaining customer consent for the use or disclosure of CPNI; (ii) to retain the "total service" approach for the use or disclosure of CPNI; and (iii) to address in a separate proceeding the consent requirements regarding the use or disclosure of location identifying CPNI.

Respectfully submitted,

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³² 47 U.S.C.A. § 312 (West Supp. 2001).